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Lim Chaet Ai v Na Boon Seng

B HIGH COURT (PULAU PINANG) — DIVORCE PETITION NO 33–303–08 OF 2015
AZMI ABDULLAH JC
28 FEBRUARY 2018

C *Civil Procedure — Action — Disposal of action without trial — Petitioner filed divorce petition on ground of unreasonable behavior of respondent — Respondent applied to have divorce petition dismissed — Whether court should refuse divorce petition without trial and benefit of hearing witnesses*

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Family Law — Divorce — Petition — Petitioner filed divorce petition on ground of unreasonable behavior of respondent — Respondent applied to have divorce petition dismissed — Whether marriage had broken down irretrievably on ground of unreasonable behavior based solely on pleadings and photographs
E *forwarded by respondent*

This was a divorce petition filed by the petitioner against the respondent on the ground of unreasonable behavior of the respondent. The respondent subsequently filed an application for the dismissal of the petition through the
F summons in chambers ('encl 45'). The respondent was applying for the court to determine the issue of whether the marriage had broken down irretrievably on the ground of unreasonable behavior based solely on the pleadings and the many photographs forwarded by the respondent. Essentially, the court was asked to decide whether the court should refuse the divorce without a trial and
G the benefit of hearing witnesses.

Held, dismissing encl 45 with costs of RM3,000:

(1) There were in fact too many instances of contrary allegations as pleaded
H by both parties which warranted the court to order a trial and not to decide just on documentary evidence which were primarily photographs from the marriage alone. Furthermore, the nature of the petitioner's complaint could only really be proved by oral evidence and by the court hearing the testimony of witnesses. Therefore, a trial was the appropriate
I manner to proceed and the matter before the court could not and should not be disposed off by way of affidavit evidence (see paras 27 & 29).

[Bahasa Malaysia summary

Ini adalah petisyen perceraian oleh pempetisyen terhadap responden atas alasan tingkah laku responden yang tidak munasabah. Responden kemudiannya memfailkan permohonan untuk pembatalan petisyen tersebut melalui saman dalam kamar ('lampiran 45'). Responden memohon untuk mahkamah menentukan isu sama ada perkahwinan itu telah berpecah belah dengan tidak dapat lagi dipulihkan atas alasan tingkah laku yang tidak munasabah berdasarkan satu-satunya atas pliding dan banyak gambar yang dihantar oleh responden. Pada dasarnya, mahkamah diminta untuk memutuskan sama ada mahkamah patut menolak perceraian tersebut tanpa perbicaraan dan faedah mendengar saksi-saksi.

Diputuskan, menolak lampiran 45 dendan kos sebanyak RM3,000:

(1) Sebenarnya terdapat terlalu banyak contoh dakwaan bertentangan seperti yang diplidkan oleh kedua-dua pihak yang mewajarkan mahkamah untuk memerintah perbicaraan dan bukan untuk memutuskan hanya atas keterangan dokumentar yang mana terutamanya adalah gambar-gambar daripada perkahwinan sahaja. Selanjutnya, sifat aduan pempetisyen hanya boleh dapat dibuktikan dengan keterangan lisan dan dengan mahkamah mendengar keterangan saksi-saksi. Oleh itu, perbicaraan adalah cara yang betul untuk meneruskan dan perkara di hadapan mahkamah tidak boleh dan tidak patut didengar melalui keterangan afidavit (lihat perenggan 27 & 29).]

Notes

For cases on disposal of action without trial, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 175–209.

For cases on divorce petition, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

Cases referred to

Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313, FC (refd)

Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor [1997] 2 MLJ 252, CA (refd)

Joseph Jeganathan v Rosaline Joseph [1989] 3 MLJ 106, HC (refd)

Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (refd)

Kumarasamy a/l Sengainy & Ors v Revathy Development (M) Sdn Bhd [1995] 2 MLJ 586, HC (refd)

Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan [2005] 1 MLJ 15, CA (refd)

Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd [2014] 7 MLJ 298, HC (refd)

Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors [2002] 5 MLJ 654, HC (refd)
Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705, HC (refd)
Wong Siew Boey v Lee Boon Fatt [1994] 2 SLR 115, HC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19, O 33 r 2
Rules of the High Court 1980 O 33 r 2

SK Ang (Heng & Ang) for the petitioner.
Karin Lim (Presgrave & Matthews) for the respondent.

Azmi Abdullah JC:

INTRODUCTION

[1] The respondent in this divorce petition applied to have the divorce petition dismissed through the summons in chambers (encl 45) which prays for:

1. Based on the pleadings, documents referred to in the pleadings and the Affidavit filed in support of this Application, this Honourable Court determine the following preliminary issue:

   Whether based on the matters pleaded in the Divorce Petition, the Answer filed by the Respondent and other pleadings included in the Bundle of Pleadings and the photographs in the possession of the Respondent which will be included in the Bundle of Documents and which will show the conduct of the Petitioner, the marriage between the Petitioner and the Respondent has broken down irretrievably on the ground of unreasonable behaviour as alleged and relied on by the Petitioner;

2. That upon the above preliminary issue being determined in favour of the Respondent, the Divorce Petition filed by the Petitioner be dismissed with costs; and

3. Further or other orders as deemed fit and proper by this Honourable Court.

[2] This court after perusing the written submissions filed by the respective counsels and further oral clarifications made, decided to dismiss the summons in chambers on 22 December 2017. However, the respondent has lodged an appeal against the decision of this court to the Court of Appeal hence the grounds of judgment hereby written to elaborate on the ruling made.

[3] The following affidavits were filed by the parties:

(a) the respondent's affidavit affirmed on 18 April 2017 ('the respondent's affidavit (1)'); A

(b) the petitioner's affidavit in reply affirmed on 25 May 2017 ('the petitioner's affidavit (1)');

(c) the respondent's affidavit in reply affirmed on 30 June 2017 ('the respondent's affidavit (2)'); B

(d) the petitioner's affidavit in reply (2) affirmed on 12 July 2017 ('the petitioner's affidavit (2)');

(e) the respondent's affidavit in reply (2) affirmed on 7 August 2017 ('the respondent's affidavit (3)'); C

(f) the petitioner's affidavit in reply (3) affirmed on 25 August 2017 ('the petitioner's affidavit (3)'); and

(g) the respondent's affidavit in reply (3) affirmed on 26 September 2017 ('the respondent's affidavit (4)'). D

[4] Order 33 r 2 provides that:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. E

DELIBERATIONS OF THE COURT F

[5] The respondent is applying for the court to determine the issue of whether the marriage has broken down irretrievably on the ground of unreasonable behaviour based solely on the pleadings and the many photographs forwarded by the respondent. In essence, the court is asked to decide whether to refuse the divorce without a trial and the benefit of hearing any witnesses. G

[6] The petitioner objects to the respondent's application on three grounds. H Firstly, O 33 r 2 provides for the court to direct that the preliminary issue 'to be tried before, at or after the trial of the cause or matter'. The order provides that there should still be a trial and witnesses heard on the preliminary issue. However, the respondent is praying that the preliminary issue of whether the marriage has broken down irretrievably on the ground of unreasonable I behaviour, be decided by the court only on documentary evidence, and even that it being restricted to the pleadings and the photographs forwarded by the respondent. If it is the respondent's contention that the petitioner has no case, the respondent should have applied to strike out the petition under O 18 r 19

A and not by way of this application when parties were in the midst of compiling the bundle of documents.

[7] The second ground of objection is that this case is not a suitable one for an order to be made under O 33 r 2. Excerpts from *Mallal's Court Practice* (2011, Desk Ed) on the said order wherein it was stated that:

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(a) '... these are exceptional procedures and a judge must tread fairly and with care before adopting them.';

C (b) 'In *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 (CA) it was decided that in invoking RHC O 33 r 2 the issues in *a case should be clear and not riddled with complexities and the facts should not be in dispute. Where the issues on point of law to be decided involve the consideration of facts, resort to 033 r2 is inappropriate. It is undesirable to resolve such issues on a purely hypothetical state of facts*.'; and

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(c) '*A preliminary trial should not be ordered on matters where there is obscurity of facts or Jaw or both, or where the application of the principles of Jaw are wholly dependent on facts which have yet to be determined*'.

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[8] The parties have filed seven affidavits to this application. From a perusal of the affidavits, it is clear that there are numerous facts that are disputed. Almost every single version of events brought up by one party is disputed by the other. Is the court to accept one party's affidavit evidence to the exclusion of the other? This is a classic case where the ultimate purpose of a trial achieves its fruition only with witnesses answering questions from counsel of both sides so that the court may glean from the answers and the demeanour of the witnesses the truth of the matter.

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G **[9]** The court in *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149 has provided four principles governing the application of O 33 r 2 from established authorities in these terms:

> (1) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter; (2) that the application under O 33 r 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced; (3) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and (4) that the court should be wary and warn itself against the abuse of this process.

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[10] In the case of *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313, the Federal Court held that:

(a) 'it is undesirable to have a trial of preliminary issues of fact and counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily';

(b) 'Preliminary points of law have been described as too often treacherous short cut and their price can be delay, anxiety and expense: see *Tilling v Whiteman* per Lord Wilberforce ... But where it is a trial of so-called preliminary issues of fact, the justification is even harder to see.'; and

(c) 'The court must also be chaty of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action'.

[11] In the case of *Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252, the Court of Appeal held that:

(a) the application under the rule was rightly dismissed as '... the several questions or issues raised needed to be clarified by evidence and as such could not be considered to be preliminary points.'; and

(b) 'We are with the learned judge when he found the issues before him had no merit for the exercise of his discretion, bearing in mind the stage when the questions were posed, especially at almost the date fixed for the hearing of the case'.

[12] The petitioner has raised various instances in para 10 of the petition as well as in her reply dated 14 January 2016, surrejoinder dated 5 April 2017 and surrebutter dated 10 June 2017 in support of her contention that the respondent's unreasonable behaviour has caused the irretrievable breakdown of their marriage. These instances are all disputed by the respondent who has in his turn set out his version of events. For example:

(a) the petitioner averred to have met one Lily Liew once without the presence of the respondent and that the said Lily Liew never contacted her again (para 4 of the petitioner's affidavit (1)) whilst the respondent claimed that the petitioner refused to answer her calls;

(b) the petitioner averred that she initiated counselling sessions with one Dr Phang through Dr Gun Suk Chyn (para 8 of the petitioner's affidavit (2)) and despite the text messages exhibited as exh 'P12', the respondent claimed he is the one who obtained his services;

(c) the petitioner's complain that the parties have had sexual relations less than ten times throughout the duration of the marriage and not since mid-2009, that the respondent has failed to show physical signs of caring such as kissing, hugging or holding the petitioner's hands has been

A answered by vague replies that there are two children from the marriage and the respondent is not a 'romantic' person;

(d) the petitioner's complaint that the respondent makes no attempt to have any relationship with the petitioner's family and the respondent's bare denial of the same;

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(e) the respondent's claim that the petitioner has tricked him into opening a joint account at HSBC and depositing RM200,000 into the account in July of 2013 so that she would stop the divorce process. There is a vehement denial by the petitioner in light of the petitioner's averments that the said joint account was in existence since 2004 and the mandate to the bank has always been either party to sign for withdrawals. The bank statements exhibited as 'P9' and the text communication between the parties exhibited as 'P10' in the petitioner's affidavit (2) allegedly bears this fact out. Furthermore, despite the deposit of the said RM200,000 the parties continued with the official attempts at reconciliation at the Marriage Tribunal on 30 July 2013 and 1 October 2013 and with informal reconciliation with their family friend, the late Sam Wah Leong. The petitioner then instituted a second official reconciliation attempts at the Marriage Tribunal which the respondent failed to attend;

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(f) the reasons the petitioner were given the shares in the company known as NBS Consultancy Sdn Bhd;

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(g) the many accusations by the respondent that the petitioner has 'cheated' him and which is denied and explained by the petitioner;

(h) the petitioner's discovery of a thumb drive belonging to the respondent containing files of erotic stories (para 9(m) of the petitioner's affidavit (1)) of which the respondent denies belonging to him; and

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(i) the respondent has also disputed each and every allegation of unreasonable behaviour listed in para 10 of the petition.

The quoted excerpts are merely samples and do not provide an exhaustive list H of the disputed facts between the parties but they do serve as reasons why an order under O 33 r 2 for a preliminary issue to be decided by documentary evidence is not suitable.

[13] The third ground of objection is that the petitioner has shown by her I pleadings and the affidavits that she has a good case to for the marriage to be dissolved based on the unreasonable behaviour of the respondent. The attempt to rebut her many allegations of unreasonable behaviour by just the production of photographs should not be accepted by this honourable court and the petitioner's many complaints should not be dismissed without a trial.

[14] The photographs act as mere snapshots of moments in a 16 years old marriage, many of which were taken during family celebrations. The photographs that are taken in the early years of the marriage, or during outings or of the children have no bearing nor are they are an adequate reply to the petitioner's allegations of the respondent's behaviour which she finds intolerable. The petitioner's contention is not that any one of the respondent's behaviour caused the marriage to have broken down. If that were so, the court would have been called to decide the fate of this marriage many years ago.

[15] The petitioner's averments are that the respondent's attitude towards her and his continued failure to show her care, trust and love in the many instances enumerated in her pleadings and affidavits have cumulatively caused the breakdown of the marriage. The erosion in the marriage did not happen overnight. It is the result of many years of unhappiness due to the respondent's repeated unreasonable behaviour. The petitioner averred:

(a) at para 17, the petitioner's affidavit (1): 'I believe our marriage had broken down irretrievably in 2013 to 2014. Even then, I continued to care for the family, to go out with the family on outings and holidays because I believe it is important for our children's emotional wellbeing that I get along with the Respondent. I continued going on holidays up to 2014 with the family as we were still working to reconcile the marriage and because I wanted our children to continue enjoying the benefit of the presence of both parents, as much as possible, in their lives but the fact remains that the Respondent and I were no longer living as husband and wife'; and

(b) at para 18, the petitioner's affidavit (1): 'When I cook, I cook for the whole family because regardless of my feelings towards the Respondent, I believe in inculcating in our children good manners and common decency. The Respondent pays for our food and the roof over our head. I see nothing wrong in cooking for him or behaving in a civilised manner when we are out in public as a family. It would make no sense for me to show an angry face when photographs are taken during these outings'.

[16] The petitioner contends that this is a responsible attitude of a parent using her best endeavours to shield her children from the effects of the breakdown of their parents' marriage. Photographs such as those taken of the family during celebrations are not uncommon even for divorced parents who manage to maintain an amicable relationship with each other.

[17] On the point of intolerable behaviour leading to an irretrievable breakdown of marriage, the court refers to *Joseph Jeganathan v Rosaline Joseph* [1989] 3 MLJ 106 where the petitioner relied on 'the cumulative effect of all these problems to show that the marriage has irretrievably broken down'. The

court held, 'the proper test to be adopted is whether a right thinking man in all the circumstances would conclude that the respondent had behaved in such a way that the petitioning spouse could not reasonably be expected to live with the respondent. In doing so, the court must take into account the whole of the circumstances and the characters and personalities of the parties'. The court is of the opinion that this can only be done after hearing the oral testimony of the parties and not by way of pleadings and photographs.

[18] Reference is also made to *Wong Siew Boey v Lee Boon Fatt* [1994] 2 SLR 115 wherein the complaint was in short, 'that the respondent has not shown or only shown little love and affection, little communication and when they did communicate, it ended up in a quarrel', facts of which are rather similar to this case. The court held, inter alia that:

(a) 'the question whether the respondent behaved in such a way that it was unreasonable to expect the petitioner to live with the respondent was essentially a finding of fact';

(b) 'the court must take into account the cumulative effect of behaviour. Any conduct, active or passive, constituted behaviour. The behaviour was not confined to behaviour towards the petitioner. The behaviour should effect the marriage although it may be towards other members of the family or towards outsiders. All behaviour may be taken into account, including omissions, where it had reference to the marriage. … The court must have regard to the personalities of individuals before it, however far these may be removed from some theoretical norm, and it must assess the impact of the respondent's conduct on the particular petitioner in the light of the whole history of the marriage and their relationship'; and

(c) referring to *Rayden's Law and Practice in Divorce and Family Matters*, in explaining cumulative effect of behaviour, 'Regard will be had to the cumulative effect of behaviour, for, while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the respondent'.

[19] The respondent's many bitter accusations throughout his affidavit can be read as further proof of the irretrievable breakdown of the marriage. They are:

(a) the respondent's many accusations in his four affidavits against the petitioner's alleged 'greed' and motive to 'extract' money from the

respondent and abusing the court process to enrich herself are symptomatic of a total breakdown of trust. For example, in the respondent's affidavit (1):

(i) para 4, line 15, '... the Petitioner's intention and motive in filing the Petition is to 'extract' as much wealth as possible from me. Her main concern was as to how much she could get from me ...';

(ii) para 4.7, line 3, '... which also shows her greed for money ...';

(iii) para 5.3, line 4, 'The Petitioner had put up an act as if the marriage had broken down and that in order to make it work, she had to be 'compensated' in the form of money';

(iv) para 5.4, line 1, '... what was at the fore-front of the Petitioner's mind was nothing but as to how much wealth she could extract from me.';

(v) para 6.3, line 5, 'The Petitioner used the threat of divorce as a ploy to extract money from me';

(vi) para 9, line 7, '... by way of a divorce she can squeeze money out of me. Her strategy is to get as much money as possible from me';

(vii) para 18, line 7, 'She has devised a plan with the ulterior motive that by pretending the marriage has ended and she is going for divorce, she can extract money from me.'; and

(viii) para 22, line 7, 'The whole Petition is a ploy employed by the Petitioner to extract more wealth from me ...'.

These are instances from only one of the respondent's affidavit. The rest of the affidavit is taken up by his allegations of the many ways the petitioner has 'cheated' him. These accusations are repeated numerous time in his next three affidavits. In fact, these accusations are supportive of the petitioner's allegation that the respondent's had constantly complained of her expenditure throughout the years resulting in her having to use her savings and in juggling household monies; and

(b) the respondent has also repeatedly alleged that the petitioner 'is a mentally unstable person' and 'suffers from paranoia, delusions and other psychological issues', all allegations of which are unsubstantiated and scandalous in nature but he has failed to provide any supporting evidence. In fact, the children remain in the petitioner's care and the respondent even alleged that the petitioner is an educated woman who knows her rights. It is not unfair to surmise that the respondent has deep emotional issues with the petitioner that leads him to make such bitter accusations against her.

[20] In addition, the respondent failed to attend the official reconciliation attempts held by the Marriage Tribunal at the end of 2014 out of which a certificate was issued that reconciliation attempts were unsuccessful. This evidences the respondent's acceptance as to the futility of any attempts at reconciliation and the irretrievable breakdown of the marriage.

[21] The respondent submitted that the 'Petitioner is using the threat of divorce as a ploy to extract money from him'. This is a serious allegation that the petitioner has disputed all of his claims and it is trite law that when facts are disputed, the matter should not be decided on affidavit evidence alone. Instead witnesses should be called, heard and parties afforded an opportunity to question them.

[22] The respondent had stated in para 28 of his submission various facts that purportedly prove that the marriage has not broken down. On the contrary, the petitioner has adequately explained these facts in her affidavits in that the petitioner:

(a) has not left the matrimonial home because of the children and the fact that she is dependent on the respondent for financial support. The petitioner is afraid that if she moves away, the respondent is likely to stop providing for her and to refuse her access to the children as he has threatened to do so before;

(b) had attended her father-in-law's funeral out of respect for him as the grandfather of her children and regardless of her relationship with the respondent; and

(c) has continued to cook for the family, to go out with the family on outings and holidays because she believes it is important for the children's emotional wellbeing that she gets along with the respondent. She continued going on holidays up to 2014 with the family as the parties were still working to reconcile the marriage but the fact remains that the petitioner and the respondent were no longer living as husband and wife. There are no sexual relations and the parties seldom communicate with each other save relating to the management of the household.

[23] The respondent's repeated allegations of the petitioner's motive to extract money from him sees the petitioner vehemently denying such allegations. It is quite normal for a husband to provide for a wife and family. What more in the circumstances of this case where the husband is a doctor who earns approximately RM800,000 a year and a wife who is unemployed but instead stays at home to care for the house and family. It is also due process to apply for financial support and distribution of matrimonial assets in a divorce proceeding. The petitioner's prayers for these will only be able to be assessed by the court after a trial and not just by the repeated allegations of the husband

that the wife is 'greedy' and trying to extract money from him.

[24] Furthermore, the respondent's given examples of petitioner's alleged greed as submitted in para 54 of the respondent's submission bears further investigation by the court. For example, the respondent's insistence that the petitioner 'tricked' him to open a joint account with HSBC when the documents exhibited as 'P9' in the petitioner's affidavit (2) shows that the account has long been in existence. Another example is that she purportedly 'tricked' him to pay premium for her insurance which turned out to be unit trust. The court takes cognisance of the fact that most if not all life insurance policies are now investment linked and premiums paid are used to purchase unit trusts. As for the allegations that the petitioner has numerous credit cards, bank accounts and investment accounts, it can be gathered from the said exh 'NBS20' that there is very little money or investment value in the said accounts and that most of the credit cards are not utilised.

AUTHORITIES RELIED UPON

[25] This court upon a perusal of the authorities relied upon by the respondent in supporting this application finds them to not be in pari materia with the facts prevalent in the matter before this court. Both in *Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors* [2002] 5 MLJ 654 and *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2014] 7 MLJ 298 dealt with the issue of locus standi for bringing the actions concerned. In *Kumarasamy a/l Sengainy & Ors v Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586, the pertinent issue was whether the agreement relied upon had expired through the effluxion of time. And in *Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705, it was observed that the salient facts were not in serious dispute or controversy.

[26] The matter before this court contains layers of facts for which the parties have given different takes and perceptions of the facts presented to the court hence this court finds that it does not involve a single material fact that can be determined to bring a finality to the divorce petition by way of a determination of a preliminary issue as in those four cases referred to by the respondent.

CONCLUSION

[27] There are in fact too many instances of contrary allegations as pleaded by both parties which warrants the court to order a trial and not to make a decision just on documentary evidence which are primarily photographs from the marriage alone. Furthermore, the nature of the petitioner's complaint can only really be proved by oral evidence and by this court hearing the testimony

of witnesses hence a trial is the appropriate manner to proceed.

[28] After perusing all the affidavits filed for this application by the respective parties, this court has arrived at the conclusion that there are clearly disputed facts prevalent in this case which cannot be conclusively decided by the mere perusal of affidavits and the exhibits in the form of photographs as urged by the respondent. Only viva voce evidence being adduced at trial can truly provide a true picture (no pun intended) of the problems existing between the two parties.

[29] This court thus concludes that the matter before this court contains very different perspectives of the salient facts by the contesting parties hence cannot and should not be disposed off by way of affidavit evidence. Enclosure 45 is hereby dismissed with costs of RM3,000.

Enclosure 45 dismissed with costs of RM3,000.

Reported by Dzulqarnain Ab Fatar